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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Art Unit: 3634 Examiner: THOMPSON II, Hugh B.

In Re Application of: WOLLER, Ronald R., et al )  
Serial No.: 10/776,845 )  
Filed: February 11, 2004 ) Appeal No. \_\_\_\_\_  
For: FOOTHOLD FOR CLIMBING TREE STANDS )

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July 6, 2006

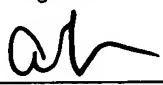
**APPEAL BRIEF UNDER 37 C.F.R. § 41.37**

**INTRODUCTION**

This is an appeal to the Board of Patent Appeals and Interferences of the rejection of the claims in the subject application. The Applicants previously filed an appeal brief on December 15, 2005, after which the Examiner reopened prosecution and maintained substantially the same grounds of rejections that were previously appealed. Pursuant to M.P.E.P. § 1207.04, Applicants initiate this new appeal. This Brief is in furtherance of Applicants' Notice of Appeal under 37 C.F.R. § 41.31, filed July 6, 2006. No extension of time is believed to be due. However, if any extension is required, please consider this a request therefore. The requisite fees for this Brief were paid on October 11, 2005. The Commissioner is authorized to charge any additional fees or credit any overpayment to Deposit Account 50-1513.

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### **1. REAL PARTY IN INTEREST**

The real party in interest is the owner of the present application, Summit Treestands, LLC (the assignee of this application) of 715 Summit Drive, S.E., Decatur, Alabama 35601.

### **2. RELATED APPEALS AND INTERFERENCES**

There are no other known appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this Appeal.

### **3. STATUS OF CLAIMS**

Claims 1-3, 5-11, 13-17, 19, and 20 are pending in this application. Claims 10 and 16 stand objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim as an any intervening claim. Claims 1-3, 5-9, 11, 13-15, 19, and 20 stand rejected. Claim 17 was neither rejected nor indicated as allowable.

The appealed claims are Claims 1-3, 5-11, 13-17, 19, and 20.

### **4. STATUS OF AMENDMENTS**

A Response and Amendment was filed on July 6, 2006, to amend a drawing to include a reference number previously omitted. The Examiner has not yet entered this amendment. However, Claims 1-3, 5-9, 11, 13-15, 19, and 20 stand rejected (though not finally rejected) on substantially the same grounds that were cited in the Final Rejection of Claims 1-3, 5-11, 13-17, 19, and 20 of July 11, 2005. Claims 10 and 16 were objected to

but were indicated to be allowable if rewritten in independent form, and Claim 17 was neither rejected nor allowed.

## **5. SUMMARY OF CLAIMED SUBJECT MATTER**

The claimed invention of independent Claim 1 relates generally to a foot engaging member (two of which are shown in the figures and identified by element numbers 100 and 101) for use with a climbing tree stand assembly (10) including a platform (11) and a support member (two of which are shown in the figures and identified by element numbers 36 and 37) attached to the platform, as depicted in Figures 1-4. The foot engaging member (100) includes a mounting portion (104) for attachment to the climbing tree stand assembly (10) and a rigid tail portion (105) having a curved elongate body (122) and extending away from the mounting portion. The foot engaging members (100, 101) are described in the specification on page 5, paragraph 20, line 11, through page 6, paragraph 25, line 24.

The claimed invention of dependent Claim 5 relates generally to the foot engaging member (100) as described with regard to Claim 1, wherein the foot engaging member comprises substantially rigid molded plastic. Such limitation is clearly described on page 5, paragraph 21, lines 20-21.

The claimed invention of independent Claim 8 relates generally to a climbing tree stand assembly (10), as shown in Figures 1-4. The climbing tree stand assembly (10) comprises a platform (11), a pair of support arms (36, 37) attached to the platform, and a pair of rigid footholds (100, 101) attached to the platform or the support arms and extending generally over the platform. The rigid footholds (100, 101) are described in the specification on page 5, paragraph 20, line 11, through page 6, paragraph 25, line 24.

The claimed invention of dependent Claim 13 relates generally to the climbing tree stand assembly (10) as described with regard to Claim 8, wherein the footholds (100, 101) each comprise a molded plastic body. Such limitation is clearly described on page 5, paragraph 21, lines 20-21.

The claimed invention of independent Claim 14 relates generally to an improvement for a climbing tree stand (10) of the type for use by a user and including a platform (11) and a pair of support arms (36, 37) attached to the platform. The improvement therein comprises a pair of rigid foothold devices (100, 101) attached to the platform (11) or the support arms (36, 37). The rigid foothold devices are described in the specification on page 5, paragraph 20, line 11, through page 6, paragraph 25, line 24.

The claimed invention of dependent Claim 19 relates generally to the improvement as described with regard to Claim 14, wherein the rigid foothold devices (100, 101) comprise a curved elongate body portion (105) and an attachment portion (104) for attaching to either the platform (11) or the support arms (36, 37). Furthermore, the rigid foothold devices (100, 101) comprise a molded plastic body. Such limitation is clearly described on page 5, paragraph 21, lines 20-21.

The claimed invention of dependent Claim 20 relates generally to the improvement as described with regard to Claim 14, wherein the rigid foothold devices (100, 101) comprise a curved elongate body portion (105) and an attachment portion (104) for attaching to either the platform (11) or the support arms (36, 37). Furthermore, the attachment portion (104) of the rigid foothold devices (100, 101) comprises a yoke (106) for fastening to one of the support arms. Such limitation is clearly described on page 5, paragraph 22, lines 24-26 and is shown in Figure 5A, which was previously amended by

the Applicants in the Response to the Office Action of April 4, 2006, to include reference number 106.

## **6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The grounds of rejection to be reviewed on appeal are:

- (1) Claim 20 stands rejected under 35 U.S.C. §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
- (2) Claims 1-3, 5-9, 11, 13-15, and 19 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,971,104 of Woller.
- (3) Claims 10 and 16 stand objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

## **7. ARGUMENT**

### **(1) Rejection of Claim 20 Under 35 U.S.C. §112, Second Paragraph**

Claim 20 stands rejected as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention under 35 U.S.C. §112, second paragraph. The Examiner has erroneously rejected the Applicants' claim. Specifically, the Examiner was unclear as to what constitutes a yoke in Claim 20. Applicants respectfully submit that the original description and amended Fig. 5A, which was amended in the Response to the Office Action of April 4, 2006, describes and shows

the yoke 106 of the foothold device. Applicants respectfully submit that Claim 20, in its current form, is not indefinite.

**(2) Rejection of Claims 1-3, 5-9, 11, 13-15, and 19 Under 35 U.S.C. §102(b) over**

**U.S. Patent No. 5,971,104 of Woller**

Claims 11-3, 5-9, 11, 13-15, and 19 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,971,104 of Woller. The Examiner has erroneously rejected the Applicants' claims.

To be a valid 35 U.S.C. § 102(b) rejection, a single reference must disclose each and every element of the claims. The rejection here is improper because the reference does not disclose each and every element of the claims.

**Claim 1-3 and 6-7**

Claims 1-3 and 6-7 are not anticipated by U.S. Patent Number 5,971,104 of Woller. Independent Claim 1 recites, "A foot engaging member for use with a climbing tree stand assembly including a platform and a support member attached to the platform, comprising: a mounting portion for attachment to the climbing tree stand assembly; and a rigid tail portion having a curved elongate body and extending away from the mounting portion" (emphasis added).

U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest foot engaging members that have a rigid tail portion. Rather, U.S. Patent Number 5,971,104 of Woller discloses foot engaging members that are a pair of stiff, flexible straps, which are not rigid, for providing the outdoorsman a mechanism to manipulate the foot-support assembly. U.S. Patent Number 5,971,104 of Woller discloses that "[t]he straps may be fashioned from suitable, conventional nylon web material. One-inch wide nylon webbing is

preferred since it has a stiffness that causes the strap to stand up presenting a loop for the outdoorsman. In addition, other materials such as cotton, dacron, synthetic polymers, and the like can be used for the foot straps 96, or the strap 66 of the seat assembly” (Col. 7, lines 41-44). Clearly, the straps of U.S. Patent Number 5,971,104 of Woller are flexible and tensile. Rigid devices, however are “deficient in or devoid of flexibility” (Merriam-Webster OnLine Dictionary, a copy of which is included in the Evidence Appendix), and thus do not deform under load. The terms rigid and flexible are antonyms. The present application describes and claims footholds that are rigid, and the prior art describes footholds that are flexible.

The Examiner’s position that the term “synthetic polymers,” as used in the present context, includes rigid plastic such as polyvinylchloride (PVC), is simply unfounded. As an aside, the Examiner uses a Wikipedia definition of the term “synthetic polymers” (a copy of which is included in the Evidence Appendix) to show that PVC is a synthetic polymer, but events in the news point out that Wikipedia may or may not be accurate, as Wikipedia allows non-reviewed material to be posted by outside contributors. Indeed, synthetic polymers, in certain forms can be flexible, and synthetic polymers in other forms can be rigid. Thus, synthetic polymers, like other materials including metals, can be rigid or flexible depending on how they are fabricated. The Examiner’s reliance on the type of material used for the footholds is misplaced. For example, a synthetic polymer that is long and thin could be flexible, just like a single strand of a steel cable is flexible. A synthetic polymer that is molded can be a hard, rigid structure, just as a steel beam is a hard, rigid structure. However, there is simply no disclosure in U.S. Patent Number 5,971,104 of Woller to support the notion that the synthetic polymers are rigid.

Moreover, the Examiner's position appears to be that the word "rigid" is synonymous with the word "stiff." In essence, the Examiner is removing the word "rigid" from the claims, and inserting the phrase "somewhat stiff," so that the claims read on the prior art. The Examiner's position obviously is not sustainable.

Even the definition of "rigid" as supplied by the Examiner supports the Applicants' position. The Examiner cites "rigid" as meaning "appearing stiff and unyielding" (Webster's 10th edition, emphasis added, a copy of which is included in the Evidence Appendix). It appears that the Examiner is simply ignoring the second part of the definition (the very definition that the Examiner relies on) of rigid in that rigid devices are stiff and (not or) unyielding. Under the Examiner's definition of rigid, a man's shirt collar would be considered rigid, for example. A man's shirt collar is somewhat stiff in that the collar can stand up under its own weight, but no one would consider a man's shirt collar to be rigid. If some relative small amount of force is applied to the shirt collar, it will yield and deform. Thus, a man's shirt collar is somewhat stiff, but it is certainly not rigid. Similarly, under the Examiner's definition, congealed Jello® brand gelatin too would be considered rigid. Jello®, when chilled, has some stiffness to it so that it holds its shape, but Jello® is not rigid, as even a very slight amount of force would cause the Jello® to yield and deform. Those skilled in the art would not consider Jello® or a man's shirt collar, though both somewhat stiff, to be rigid.

Similarly, the flexible straps of U.S. Patent Number 5,971,104 of Woller are somewhat stiff, but they are not unyielding so as to be considered rigid. In fact, the straps of U.S. Patent Number 5,971,104 of Woller will yield and deform if force is applied to them, just like a man's shirt collar and Jello®. Therefore, the flexible straps, just like a man's shirt



collar and Jello®, are not rigid.

To the contrary, the foot engaging members of the present application are both stiff and unyielding when force is applied, and are thus rigid, which is not disclosed, taught, or suggested by U.S. Patent Number 5,971,104 of Woller. Thus, Claim 1 is not anticipated by U.S. Patent Number 5,971,104. Accordingly, allowance of Claim 1, and by dependency, Claims 2-3 and 6-7, is respectfully requested.

#### **Claim 5**

Claim 5 is not anticipated by U.S. Patent Number 5,971,104 of Woller. Claim 5 recites, "The foot engaging member of Claim 1, wherein the foot engaging member comprises substantially rigid molded plastic." U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest a foot engaging member comprising a substantially rigid molded plastic. Rather, as stated herein, the foot engaging member of U.S. Patent Number 5,971,104 of Woller comprises a pair of flexible members, which obviously are not constructed of rigid molded plastic. Accordingly, allowance of Claim 5 is respectfully requested.

#### **Claims 8-11**

Claims 8-11 are not anticipated by U.S. Patent Number 5,971,104 of Woller. Claim 8 recites, "A climbing tree stand assembly comprising: a platform; a pair of support arms attached to the platform; and a pair of rigid footholds attached to the platform or the support arms and extending generally over the platform" (emphasis added).

U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest a climbing tree stand assembly having a pair of rigid footholds. Rather, as stated herein, the footholds of U.S. Patent Number 5,971,104 of Woller comprise a pair of flexible members,

which obviously are not rigid. Thus, though the footholds of U.S. Patent Number 5,971,104 of Woller are stiff, they certainly are not rigid. Accordingly, allowance of Claim 8, and by dependency, Claims 9-11, is respectfully requested.

### **Claim 13**

Claim 13 is not anticipated by U.S. Patent Number 5,971,104 of Woller. Claim 13 recites, "The climbing tree stand assembly of Claim 11, wherein the footholds each comprise a molded plastic body." U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest a pair of footholds each comprising a substantially rigid molded plastic. Rather, as stated herein, the footholds of U.S. Patent Number 5,971,104 of Woller comprise a pair of flexible members, which obviously is not a molded plastic body. Accordingly, allowance of Claim 13 is respectfully requested.

### **Claims 14-17**

Claims 14-17 are not anticipated by U.S. Patent Number 5,971,104 of Woller. Claim 14 recites, "In a climbing tree stand including a platform and a pair of support arms attached to the platform, the climbing tree stand for use by a user, the improvement therein comprising: a pair of rigid foothold devices attached to the platform or the support arms" (emphasis added).

U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest climbing tree stand assembly having an improvement comprising a pair of rigid foothold devices. Rather, as stated herein, the foothold devices of U.S. Patent Number 5,971,104 of Woller comprise a pair of flexible members, which obviously are not rigid. Thus, though the foothold devices of U.S. Patent Number 5,971,104 of Woller are stiff, they certainly are not rigid. Accordingly, allowance of Claim 14, and by dependency, Claims 15-17, is

respectfully requested.

**Claim 19**

Claim 19 recites, "The improvement of Claim 17 wherein the rigid foothold devices comprise a molded plastic body." U.S. Patent Number 5,971,104 of Woller does not disclose, teach, or suggest a pair of rigid foothold devices comprising a substantially rigid molded plastic. Rather, as stated herein, the footholds of U.S. Patent Number 5,971,104 of Woller comprise a pair of flexible members, which obviously is not a molded plastic body. Accordingly, allowance of Claim 13 is respectfully requested.

### CONCLUSION

In view of the above and the attached appendices, the pending grounds of rejection cannot be maintained and all pending claims must be allowed. Any communication that may expedite allowance should be directed to Applicants' undersigned attorney at (770) 984-2300.

Respectfully submitted,  
GARDNER GROFF SANTOS & GREENWALD, P.C.

A handwritten signature in black ink, appearing to read "Michelle E. Kandcer", is written over a horizontal line.

Michelle E. Kandcer  
Reg. No. 54,207

GARDNER GROFF SANTOS & GREENWALD, P.C.  
Customer Number 23506

Tel: 770.984.2300  
Fax: 770.984.0098

## **8. CLAIMS APPENDIX**

1. A foot engaging member for use with a climbing tree stand assembly including a platform and a support member attached to the platform, comprising:
  - a mounting portion for attachment to the climbing tree stand assembly; and
  - a rigid tail portion having a curved elongate body and extending away from the mounting portion.
2. The foot engaging member of Claim 1, wherein the mounting portion is configured to be attached to the support member of the climbing tree stand assembly.
3. The foot engaging member of Claim 2, wherein the tail portion is configured to extend generally downwardly toward the platform of the tree stand assembly.
5. The foot engaging member of Claim 1, wherein the foot engaging member comprises substantially rigid molded plastic.
6. The foot engaging member of Claim 1, wherein the mounting portion is configured to secure the foot engaging member to either the support member or to the platform.
7. The foot engaging member of Claim 6, wherein the mounting portion is secured to the support member with a fastener.

8. A climbing tree stand assembly comprising:  
a platform;  
a pair of support arms attached to the platform; and  
a pair of rigid footholds attached to the platform or the support arms and extending generally over the platform.
9. The climbing tree stand assembly of Claim 8, wherein the pair of footholds each comprise a curved elongate body portion and a clamping portion for attaching to either the platform or the support arms.
10. The climbing tree stand assembly of Claim 9, wherein clamping portions are attached to the support arms.
11. The climbing tree stand assembly of Claim 9, wherein the curved elongate body portions extend generally over the platform.
13. The climbing tree stand assembly of Claim 11, wherein the footholds each comprise a molded plastic body.
14. In a climbing tree stand including a platform and a pair of support arms attached to the platform, the climbing tree stand for use by a user, the improvement therein comprising:  
a pair of rigid foothold devices attached to the platform or the support arms.

15. The improvement of Claim 14 wherein the rigid foothold devices extend generally between the support arms and the platform.

16. The improvement of Claim 14 wherein the rigid foothold devices are attached to the support arms and extend toward the platform.

17. The improvement of Claim 14 wherein the rigid foothold devices comprise a curved elongate body portion and an attachment portion for attaching to either the platform or the support arms.

19. The improvement of Claim 17 wherein the rigid foothold devices comprise a molded plastic body.

20. The improvement of Claim 17 wherein the attachment portion of the rigid foothold devices comprises a yoke for fastening to one of the support arms.

## **9. EVIDENCE APPENDIX**

No evidence pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132 was entered by the Examiner and relied upon the Appellant in the appeal.

Other evidence entered by the Examiner includes:

- (1) U.S. Patent No. 5,971,104 of Woller;
- (2) a Wikipedia definition of "synthetic polymer";
- (3) a Webster's 10<sup>th</sup> edition dictionary definition of the word "rigid"; and
- (4) a Merriam-Webster OnLine dictionary definition of the word "rigid."

A copy of the evidence is attached hereto.



# Synthetic polymer

From Wikipedia, the free encyclopedia.

Synthetic polymers are often referred to as "plastics", such as the well-known polyethylene and nylon. However, most of them can be classified in at least three main categories: thermoplastics, thermosets and elastomers.

Man-made polymers are used in a bewildering array of applications: food packaging, films, fibers, tubing, pipes, etc. The personal care industry also uses polymers to aid in texture of products, binding, and moisture retention (e.g. in hair gel and conditioners).

## Examples

A non-exhaustive list of these ubiquitous materials includes:

- acrylonitrile butadiene styrene (ABS)
- polyamide (PA)
- polybutadiene
- poly(butylene terephthalate) (PBT)
- polycarbonate (PC)
- poly(ether sulphone) (PES, PES/PEES)
- poly(ether ether ketone)s (PEEK, PES/PEEK)
- polyethylene (PE)
- poly(ethylene glycol) (PEG)
- poly(ethylene terephthalate) (PET)
- polyimide
- polypropylene (PP)
- polytetrafluoroethylene (PTFE)
- polystyrene (PS)
- styrene acrylonitrile (SAN)
- poly(trimethylene terephthalate) (PTT)
- polyurethane (PU)
- polyvinylchloride (PVC)
- polyvinylidenedifluoride (PVDF)
- poly(vinyl pyrrolidone) (PVP)

## Brand names

These polymers are often better known through their brand names, for instance:

- Kevlar
- Kynar, e.g. PVDF
- Mylar, e.g. polyethylene terephthalate
- Nylon, e.g. polyamide 6,6
- Rilsan, e.g. polyamide 11 & 12
- Teflon, e.g. PTFE
- Ultem, e.g. polyimide
- Vectran
- Viton
- Zylon

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Thesaurus

### rigid

One entry found for **rigid**.

Main Entry: **rig·id** 

Pronunciation: 'ri-j&d

Function: *adjective*

Etymology: Middle English *rigide*, from Middle French or Latin; Middle French, from Latin *rigidus*, from *rigere* to be stiff

- 1 **a** : deficient in or devoid of flexibility <*rigid* price controls> <a *rigid* bar of metal> **b** : appearing stiff and unyielding <his face *rigid* with pain>
  - 2 **a** : inflexibly set in opinion **b** : strictly observed <adheres to a *rigid* schedule>
  - 3 : firmly inflexible rather than lax or indulgent <a *rigid* disciplinarian>
  - 4 : precise and accurate in procedure <*rigid* control of the manufacturing process>
  - 5 *of an airship* : having the outer shape maintained by a fixed framework
- **rig·id·ly** *adverb*
- **rig·id·ness** *noun*

**synonyms** RIGID, RIGOROUS, STRICT, STRINGENT mean extremely severe or stern. RIGID implies uncompromising inflexibility <*rigid* rules of conduct>. RIGOROUS implies the imposition of hardship and difficulty <the *rigorous* training of recruits>. STRICT emphasizes undeviating conformity to rules, standards, or requirements <*strict* enforcement of the law>. STRINGENT suggests severe, tight restriction or limitation <*stringent* standards of admission>. **synonym** see in addition STIFF

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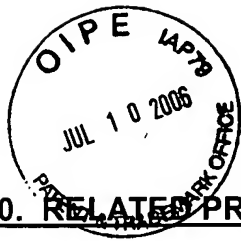
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#### 10. RELATED PROCEEDINGS APPENDIX

There are no related proceedings or decisions rendered by a court or the Board in any proceeding identified pursuant to paragraph 37 C.F. R. §41.39(c)(1)(ii).

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